

STATE OF MICHIGAN
COURT OF APPEALS

GLEN C. GATES,

Plaintiff-Appellee,

v

USA JET AIRLINES, INC.,

Defendant-Appellant.

UNPUBLISHED

February 5, 2008

No. 272860

Wayne Circuit Court

LC No. 98-833563-CK

Before: Jansen, P.J., and O’Connell and Fort Hood, JJ.

O’CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the majority opinion that the arbitrators erred by awarding plaintiff arbitration costs. I write separately to say that this arbitration award must be vacated because of plaintiff’s improper ex parte communication with the arbitrators. I would vacate the arbitration award and remand for further proceedings.

Defendant alleges that plaintiff submitted a supplemental brief to the arbitrators after the close of proofs, but did not serve the supplemental brief on defendant’s counsel. Defendant supports its assertion by citing to a copy of the brief plaintiff filed as an exhibit with the trial court that does not have a proof of service attached to it. Defendant also presented an affidavit from its counsel swearing that he never received the brief. Plaintiff has submitted no proof of service that the supplemental brief was actually served on defendant’s counsel. Because defendant did not receive plaintiff’s brief before the arbitrators determined an award, it was not afforded a meaningful opportunity to respond. I do not find it coincidental that the arbitrators’ final award substantially reflected the result that plaintiff urged in its uncontested brief.

In *Hewitt v Village of Reed City*, 124 Mich 6, 8-9; 82 NW 616 (1900), the Michigan Supreme Court vacated an arbitration award when one of the parties submitted a memorandum of authorities to the arbitrator after the case was submitted. The parties agreed that they would not be represented by counsel, “thereby stipulating to exclude all legal arguments or briefs.” *Id.* at 8. The Court held that the ex parte communication with the arbitrator violated the rules governing the submission of the case and set aside the arbitration award without inquiring into whether the arbitrator was, in fact, influenced by the memorandum. *Id.* The Court opined:

If we felt at liberty to determine the case upon the question of whether the result was probably influenced by this representation, we would have little difficulty, as the high character and unquestioned ability of the arbitrator would

furnish ample assurance that he was not unduly influenced in the matter; but, as this is the first time that the question has been presented to the court in this exact way, we are concerned in laying down a rule easy to follow, and which will afford protection in all cases, and we think the safer rule is for the court to enter into no examination as to whether the arbitrator is in any way influenced by ex parte communications. In applying that rule to this case, and in view of the stipulation that neither party should be represented by counsel, we are constrained to hold that the arbitration should be set aside. [*Id.* at 8-9.]

In the case at bar, plaintiff submitted a brief, without serving it on defendant, after the case was submitted. As in *Hewitt*, the brief that plaintiff submitted to the arbitrators contains substantive legal argument about the contractual bonuses plaintiff alleged he was entitled to receive under the employment agreement. In the brief, plaintiff urged the arbitrators to award him contractual bonuses, even if it adopted defendant's definition of "new revenues." In my opinion, the plaintiff's brief goes beyond what was submitted in *Hewitt*, because plaintiff included arguments in his brief and not merely objective, legal authority to support his position. Cf.

As in *Hewitt*, plaintiff's brief also violated the express rules governing the arbitration. The arbitrators instructed:

[T]here shall be no ex parte contact by any party with any arbitrator and . . . all pleadings, motions, briefs, discovery requests and responses, correspondence, exhibits, affidavits, documents and things of every type shall be served contemporaneously upon all arbitrators and counsel with a written and signed proof of service.

Similar to the party in *Hewitt*, *supra* at 8, plaintiff submitted the brief without serving it on defendant, thus violating the express rules governing the arbitration. Based on this case's similarity to *Hewitt* and plaintiff's improper communication with the arbitrators, this Court should vacate the arbitration award.

I would vacate the arbitration award and remand for further proceedings.

/s/ Peter D. O'Connell